IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
February 11, 2009 Session

STATE OF TENNESSEE v. ELVIN HUBIE PEARSON and MARCUS ANTHONY PEARSON

Appeal from the Criminal Court for Davidson County
No. 2007-C-1912 Monte Watkins, Judge

No. M2007-02826-CCA-R3-CD - Filed June 10, 2009

The Defendants, brothers Elvin Hubie Pearson and Marcus Anthony Pearson,[1] were each charged with the first degree premeditated murder of Kenneth Scott, the felony murder of Scott while attempting the first degree murder of Frank Newsom, the felony murder of Scott while attempting the first degree murder of Lamarco Comer, the attempted first degree premeditated murder of Newsom, and the attempted first degree murder of Comer. Following a jury trial, Elvin was found guilty of the attempted voluntary manslaughter of Scott, and Marcus was found guilty of the first degree premeditated murder of Scott. Additionally, both were found guilty of both counts of felony murder and both counts of attempted first degree murder. Elvin received a sentence of life in the Department of Correction for the felony murder of Scott while attempting the first degree murder of Newsom, a conviction into which his attempted voluntary manslaughter conviction as well as his other felony murder conviction were merged. Marcus received a sentence of life in the Department of Correction for the first degree murder of Scott, a conviction into which both of his felony murder convictions were merged. Both Elvin and Marcus also received twenty years in the Department of Correction for each of their two attempted first degree murder convictions, those sentences to be served concurrently with each other but consecutively to their life sentences. In this direct appeal, both Elvin and Marcus contend that: (1) the State presented insufficient evidence of premeditation; and (2) the State committed prosecutorial misconduct in recalling a certain witness, Karen Carney. Elvin additionally contends that the trial court erred because it: (1) denied his motion to suppress Newsom's out-of-court identification; (2) denied his motion to suppress Comer's in-court identification; (3) did not allow Comer to be properly impeached regarding his prior juvenile convictions; (4) did not allow Newsom to be properly impeached regarding his prior felony convictions; (5) allowed the State to play a portion of one of his phone calls from jail; (6) failed to strike certain improper statements in the State's closing argument; (7) allowed the State to improperly impeach by transcript; (8) ordered consecutive sentences; and (9) considered irrelevant

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[1] In order to avoid confusion, and because they share a last name, we will refer to the Defendants as "Elvin" and "Marcus" throughout this opinion.

issues at sentencing. Finally, Marcus also contends that the trial court erred in failing to grant his severance motion. After our review, we affirm both the Defendants' convictions but remand their cases for resentencing on the issue of their consecutive sentences.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed in Part; Remanded

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

J. Robin McKinney, Jr., Nashville, Tennessee, for the appellant, Marcus Anthony Pearson, and Manuel B. Russ, Nashville, Tennessee, for the appellant, Elvin Hubie Pearson.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Roger Moore, Assistant Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

We will first summarize the evidence presented at trial: at about 11:00 a.m. on April 15, 2006, one of the victims, Kenneth Scott, left the house in which he lived with his parents. At about 2:00 p.m., Scott's father called Scott's cell phone to inquire whether Scott needed to be picked up and taken to work. Scott replied that he did not because he was riding with Frank Newsom, another one of the victims. At some point, Newsom and Scott picked up the third victim, Lamarco Comer, who needed help transporting his mother's broken-down car to the repair shop. After taking the car to the shop, Newsom, Scott, and Comer drove to Knoll Crest Apartments ("Knoll Crest").

Newsom had spoken earlier in the day to Andrew Shute, who had told Newsom that he had agreed to sell $600 to $700 of marijuana to one of the Defendants, Marcus Pearson. Shute had also told Newsom that he planned to "slick" Marcus out of the money, meaning that he planned to take the money from Marcus and leave without delivering any marijuana. Scott and Comer had no knowledge of this plan. Shute saw Newsom's car as it pulled into Knoll Crest; he called Newsom's cell phone and told Newsom to meet him at the top of the apartment complex. Newsom did so. Shute got into Newsom's car with Newsom, Scott, and Comer. Shute then called Marcus, told him he was coming to Knoll Crest, and instructed Marcus to park at a particular place for their meeting. Shute instructed Newsom to drive him to that place.

Upon their arrival, Shute saw Marcus' gold Dodge Stratus in a parking space at the appointed location. Newsom parked in an adjacent space. Shute exited Newsom's vehicle and got into the backseat of Marcus' vehicle. Marcus was in the driver's seat and his younger brother, Ronald

Ettienne, was in the front passenger seat. Marcus was parked in front of a building with a breezeway running through its center; Shute told Marcus that the he had the marijuana in the breezeway and that he would return with it if Marcus gave him the money. Marcus did so. Shute exited Marcus' car, walked into the breezeway and, after turning around to make sure he was out of sight, ran to a waiting friend's car. They left.

Newsom, Scott, and Comer, drove away immediately after Shute entered Marcus' vehicle. They went to a nearby convenience store, returning to Knoll Crest between fifteen and sixty minutes later, intending to visit Newsom's sister's apartment in Knoll Crest's building F. As they parked in front of building F and exited the vehicle, Marcus' car and another unidentified car pulled up to the right. Elvin Pearson exited the unidentified car and walked toward Marcus' driver's side door, at which point Marcus exited the car.

Newsom, Scott, and Comer now faced the parking lot, with their backs to the entrance of a two-sided breezeway running away from them and through building F. Comer stood between Newsom and Scott; Scott stood on Comer's left and Newsom stood on Comer's right. Elvin and Marcus walked toward them. Elvin stood in front of Newsom, and Marcus stood in front of Scott. Elvin asked Newsom, "where your boy at?" Newsom, assuming he was referring to Shute, responded that he did not know. Elvin and Marcus each pulled out a gun; Marcus' gun was black and Elvin's gun was silver and black. Elvin pointed his gun at Newsom's face and chest. He then grabbed Newsom by the shirt and demanded Marcus' money. Newsom responded that he could call Shute and produced Scott's cell phone, which he had been holding. Newsom dialed Shute's number and handed the phone to Elvin.

Elvin put the phone to his ear for a few moments and then angrily hung up. It is not clear whether he spoke to anyone or heard a voicemail message. After hanging up, he grabbed Newsom again. At that moment, a car drove by through the parking lot and a woman yelled, "Hey, there's Booty Man" from inside. "Booty Man" is Newsom's nickname. Hearing this, Elvin and Marcus turned toward the parking lot. Seeing an opportunity for escape, Newsom pulled away from Elvin, turned around, and ran through the left side of the breezeway. Newsom heard shots after he had taken about two steps and saw Comer running through the right side of the breezeway. As Newsom rounded the corner at the end of the breezeway he saw Elvin shooting at him. He then continued to run into the grass field behind building F. Newsom was not hit and did not see any bullets hit Comer or Scott.

As Comer began running through the breezeway, he saw Scott try to run around the building. Comer also saw Elvin shooting at him. A bullet hit Comer in the leg; as he tried to get up Elvin shot him two more times in the same leg. At about the time Elvin fired the third shot into Comer's leg, Comer saw Marcus shoot Scott in the back. Comer heard about fifteen total shots. Police later found eight .40 caliber cartridge casings, five of which were clustered at the right entrance to the breezeway near where Marcus had been. The other three fell near the left entrance. Police also found five 9mm cartridge casings at the left entrance, near where Elvin had been. Comer was shot with 9mm bullets, and Scott with .40 caliber bullets.

Newsom turned around when the shots stopped and saw Comer crawling out of the breezeway. He also saw Scott running through the field holding his stomach. Scott then fell down. He then saw a policeman run onto the field and check both Comer and Scott before going to the front of the building. Newsom then ran over to Comer, who was still talking. He told Comer to hold on. He then ran over to Scott, who was lying face down in the grass. Newsom intended to roll Scott over, but he was told not to by a member of the crowd that had gathered. Newsom stayed in the field with Scott and Comer until paramedics arrived.

Karen Carney, another Knoll Crest resident, lived in building G, the building immediately next to building F. Just before the shooting, she went out onto her back porch with her son. She then saw a neighbor named Carlos with whom she had experienced problems in the past. As a result, she went back inside. She then heard shots coming from outside. After putting her son under the kitchen table, she looked out her front window and saw three black males, each carrying a gun, get into separate cars and drive away. Two wore baseball caps and all three had braided hair. She looked out her back window and saw Comer and Scott lying in the field.

Officer Edward Draves of the Metro Nashville Police Department responded first to the incident. He had been at building R on another call when he heard ten to fifteen shots coming from the vicinity of building F, about fifty to seventy yards away. Later testimony established that the shooting occurred at about 4:50 p.m. As he reached the field behind building F, Officer Draves saw two black males, later identified as Comer and Scott. Comer was running toward Officer Draves, while Scott ran away from him. Officer Draves drew his weapon on Comer and told him to lay on the ground. Comer told Officer Draves that he had been shot. After patting down Comer and calling for backup, Officer Draves ran over to Scott, who had fallen down. Officer Draves ordered Scott to put his hands out, but he received no response. Officer Draves saw a bullet entry wound underneath Scott's left shoulder. After confirming that Scott had no weapons, Officer Draves rolled him over and observed a bullet exit wound above Scott's heart.

Officer Draves went to the front of building F. He found some casings on the ground and bullet strikes on the walls. He then returned to Scott and Comer. Other officers arrived about one minute later, and the first ambulance arrived three or four minutes later. A large crowd had gathered, and the ten or so total officers that had arrived worked to put tape around the crime scene.

Upon their arrival, paramedics cut Scott's clothes off and transported him by ambulance to Skyline Hospital. Other paramedics cut Comer's clothes off and transported him by ambulance to Vanderbilt Hospital. Newsom, still in the area, did not talk to police. Detective James Bledsoe of the Metro Nashville Police Department arrived on the scene at about 5:20 p.m. and began speaking to witnesses and supervising the area. After viewing Comer and Scott's bloody clothes in the field behind building F and learning which hospitals they had been transported to, Det. Bledsoe instructed another detective, Harold Burke, to go to Skyline Hospital and check on Scott. Detective Burke later called Det. Bledsoe to inform him that Scott had never regained consciousness and had died at the hospital. Detective Burke also informed Det. Bledsoe that he had spoken to Scott's father at Skyline, who gave him a note that said "The Shooter" and listed Marcus' phone number. Scott's father had

apparently received that note from Newsom's stepfather. Burke also spoke to Newsom and learned of Marcus' potential involvement in the shooting. Newsom's mother then insisted that he stop talking to the police.

The next day, April 16, 2006, Det. Bledsoe and Det. Burke visited Comer at Vanderbilt Hospital. Although he was drugged with pain medication, Comer's nurses and both detectives concluded Comer was lucid enough to speak to them. Comer testified at trial that he was "hallucinating" at the time and that he had no memory of Det. Bledsoe visiting him on April 16. Based on Newsom's information, Det. Bledsoe asked Comer to look at a series of six photographs. Upon reaching Marcus' photograph, the third in the series, Det. Burke saw Comer nodding his head. Comer said, "I think that's him." Detective Bledsoe then showed Comer the remaining photographs, followed by the first, second, and third photographs again. Upon reaching the third photograph for the second time, Comer said, "that's the one with the black gun." Comer also described the shooting to Det. Bledsoe and said that the second shooter was either Marcus' brother or cousin.

Detective Bledsoe spoke to Comer again on April 20, 2006. On that day, he brought another series of six photographs, one of which depicted Elvin. When Comer reached Elvin's picture he said, "That might be him but his hair is different." Comer went through the rest of the series and started over, as he had with the first lineup. When he reached Elvin's picture the second time, he reiterated his non-positive identification, saying that the person depicted could have been the second shooter but that his hair was too different in the picture to say for sure; the shooter had braids, whereas the pictures showed men with short hair. Comer did, however, positively identify both Elvin and Marcus as the shooters at trial. Comer had never met Elvin or Marcus before the shooting.

Later that day, Det. Bledsoe talked to Carney, whose name he had received from Officer Draves. She gave her account of what had happened but was unable to identify any of the perpetrators using Det. Bledsoe's lineups. Carney, who was "terrified" during her testimony at trial, explained that she recognized Elvin as one of the men she saw running from the crime scene. Detective Bledsoe explained that he took into account Carney's claim that a third man, her neighbor Carlos, was involved in the shooting, but he disregarded him as a suspect after speaking to Newsom and Comer.

Detective Bledsoe did not speak to Newsom until April 26, 2006. Newsom explained that his mother had made him talk to a lawyer before speaking with the police. His lawyer recommended that he go to the police department and tell his story. During his conversation with Det. Bledsoe, Newsom positively identified both Elvin and Marcus using the same photographic lineups Comer had examined. Newsom had not spoken to Comer. Newsom also identified both Elvin and Marcus as the shooters at trial. He knew Marcus before the shooting because they had both worked at UPS for a short time; he had not known Elvin.

The State introduced records from Cingular Wireless showing calling activity from Marcus' cell phone. Marcus' cell called Shute's cell a number of times between 2:43 p.m. and 4:44 p.m. on April 15, 2006. The State also introduced records from Bellsouth showing calls made from the land

line in Elvin's residence on that day. Elvin did not own a cell phone. Calls were made from Elvin's land line to Marcus' cell at 4:23 and 4:24 p.m. Another call was made from Elvin's land line to another number at 5:34 p.m. A call was made to Marcus' cell again at 8:07 p.m. No other calls were made on the line during that time.

Scott's autopsy revealed that he had been shot twice. One bullet entered his back and damaged his left lung and his heart; the other entered his abdomen and damaged his small bowel. These wounds caused his death and were not survivable, but they were also not necessarily immediately disabling. Marijuana was found in Scott's system, but the quantity or exact time of use could not be determined.

The police did not recover any gun connected to the shooting. The State also did not present any physical evidence directly linking either Elvin or Marcus to the shooting.

Elvin and Marcus both chose to put on proof. Elvin's first witness, John Graves, worked at B & R Auto Sales ("B & R") on April 15, 2006. He received and processed car payments as part of his duties. He testified that Elvin came to B & R around 5:00 p.m. on the day of the shooting to make a car payment. He remembered the time because he usually counted the day's payments around then in order to deliver them to the bank by 6:00 p.m. Graves introduced a receipt given to Elvin with Graves' signature on it; it did not contain Elvin's signature. The receipt was marked "4/15/06" and included Elvin's name, but it did not have a time stamp. Graves was not one hundred percent sure Elvin was the one who made the payment, but he believed it was him; he had no association with Elvin besides periodically receiving his car payments. He had never met Marcus. Graves did not see if Elvin had anyone with him. On cross-examination, Graves agreed with the State that, at a previous hearing, he had testified that Elvin came in "after 5:00" and before 6:00 p.m.

Elvin chose to testify and gave his account of the events of April 15, 2006. He woke up around 10:00 a.m. and did some household chores. He took a nap from 1:00 to 4:20 p.m. He then called Marcus, who said the family was planning to attend a church play that evening. Elvin could hear in Marcus' voice that something was wrong; Marcus then told Elvin he had given money to someone for marijuana and that he thought the person had stolen the money. Marcus had been waiting for an hour for the person to come back. Elvin told Marcus he was stupid and that he should leave.

After hanging up, Elvin told his girlfriend, Dianne Reid, to dress their baby and get ready to leave for B & R, which Elvin wanted to reach before its closing time at 5:00 p.m. Elvin, Reid, and their child left the house before 5:00 p.m.; Elvin believed they reached B & R about that time. Elvin and Reid next planned to stop at the beauty supply store. On their way there, Elvin stopped at a gas station to get gas and cigarettes; when there, he realized he did not have his driver's license. Reid also told Elvin she needed a refill for their child's bottle.

They therefore returned to their residence. Elvin went to the bathroom, made a call to a friend, and retrieved his driver's license and a bottle refill. He and Reid then drove to the beauty supply store, where they remained for forty-five to sixty minutes while Reid tried on wigs. They left the store at about 6:41 p.m.; Elvin could say so with specificity because they had been given a receipt that said 5:41 p.m., and Reid had commented that the time was an hour early. Elvin had lost the receipt, however, and therefore could not introduce it. Elvin and Reid next went to Wal-Mart for about forty-five minutes. They then got cigarettes and gas and returned home. They arrived "after 8:00." Elvin then called Marcus and asked him about the church play.

Elvin heard two days later that Marcus had a warrant out for his arrest. Elvin realized it was a murder warrant when he saw the story on the news. He was shocked. Elvin was arrested on April 28, 2006. He had never met Scott, Comer, or Newsom, and had nothing to do with the shooting.

Marcus chose not to testify but called two witnesses. The first, Det. Willie Middleton of the Metro Nashville Police Department, testified that he helped investigate the shooting. During the course of his duties, he spoke to Comer and Comer's mother. At about 5:30 p.m. on April 15, 2006, Comer's mother had given him the name of Carlos Hart as her son's possible assailant, the same Carlos with whom Carney had experienced problems in the past and who Det. Bledsoe chose not to pursue as a suspect.

Marcus' and Elvin's mother, Cornelia Logan, also testified about her recollection of the events of April 15, 2006. Marcus had been at home when she woke up. She went to church at about 10:00 a.m. with her youngest son, Ronald Ettienne, and her eight-year-old daughter, Leah. She returned at about 1:30 p.m. to find Marcus still in the house. Because she planned to attend a church play later that evening, she took a nap from 3:00 to 5:00 p.m. When she woke up, she yelled for everyone to get ready for the play but received no response. Marcus' cell record reflected that he called Logan's cell at 5:15 p.m.; he told Logan that he and Ettienne had gone outside. They then walked into the house through the front door.

Marcus was convicted and sentenced for the first degree murder of Scott and the attempted first degree murders of Comer and Newsom. Elvin was also convicted and sentenced for the attempted first degree murders of Comer and Newsom, as well as for one count of felony murder. They now appeal.

Analysis

I. Sufficiency of the Evidence

Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn.

2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

Marcus contends that the State presented insufficient proof to convict him of first degree murder or attempted first degree murder because there was insufficient proof of premeditation. Similarly, Elvin contends that the State presented insufficient proof of premeditation and that his convictions for attempted first degree murder should thus be reversed.

First degree murder is "a premeditated and intentional killing of another." Tenn. Code Ann. § 39-13-202(a). "'[P]remeditation' is an act done after the exercise of reflection and judgment," meaning "that the intent to kill must have been formed prior to the act itself." Tenn. Code Ann. § 39-13-202(d). Although the mind requires no particular length of time to form the requisite intent to kill, a defendant must be "sufficiently free from excitement and passion to be capable of premeditation." Id. A jury may infer premeditation from the manner and circumstances surrounding the killing. Bland, 958 S.W.2d at 660.

Our supreme court has enumerated a number of factors that may support the existence of premeditation. These include (1) declarations by the defendant of an intent to kill; (2) evidence of procurement of a weapon; (3) the use of a deadly weapon upon an unarmed victim; (4) the particular cruelty of the killing; (5) infliction of multiple wounds; (6) preparation before the killing for concealment of the crime; (7) destruction or secretion of evidence of the murder; and (8) calmness immediately after the killing. State v. Nichols, 24 S.W.3d 297, 302 (Tenn. 2000). This Court has also recognized that other facts "indicative of the existence of premeditation include . . . the shooting of the victim after he had turned to retreat or escape, the lack of provocation on the part of the victim . . . and the defendant's failure to render aid to the victim." State v. Lewis, 36 S.W.3d 88, 96 (Tenn. Crim. App. 2000).

We conclude that any rational juror could have found that both Elvin and Marcus acted with premeditation. In the light most favorable to the State, the evidence showed that Marcus, after being "slicked" by Shute, called Elvin to enlist his help in finding Shute. Elvin, at least, seems to have procured a weapon; Marcus may or may not have had one already. They then searched for Shute at Knoll Crest and, unable to find him, accosted Newsom, Scott, and Comer, who they knew were acquainted with Shute, and who they may have believed assisted him in the theft. They then, without provocation, inflicted multiple gunshot wounds upon the unarmed Scott and Comer as they turned to escape. Elvin fired five bullets, and Marcus fired eight. We disagree with Marcus' contention that these were "random shots." Although we agree that there was no evidence of calmness after the shooting, Elvin and Marcus immediately fled without rendering aid to either victim.

Elvin argues that the anger he directed at Newsom following his inability to reach Shute demonstrates that he could not have been free of excitement and passion during the shooting. "The presence of agitation or even anger, in our view, does not necessarily mean that the [shooting] could not have occurred with the requisite degree of deliberation." State v. Gentry, 881 S.W.2d 1, 5 (Tenn. Crim. App. 1993). Given the application of a number of factors listed above, a rational jury could have found that Elvin and Marcus, despite their anger at Shute, premeditatedly fired upon Newsom, Scott, and Comer. This issue is without merit.

II. State Recall of Karen Carney

Both Elvin and Marcus contend that the State committed prosecutorial misconduct during their presentation of Karen Carney's testimony. At trial, Carney underwent an original period of questioning in which she testified on direct and cross-examination. She was extremely frightened and nervous during this time. During her testimony, she did not identify Elvin as being at the scene of the crime. After being dismissed from the stand, Carney left the courtroom, apparently in distress. Assistant District Attorney General Deborah Housel followed Carney from the courtroom. After the resulting discussion with Carney, during which Carney vomited, General Housel asked the trial court for permission to recall Carney for additional testimony. The trial court granted this request. Carney then took the stand and testified that she thought, but was not certain, she had seen Elvin running from the shooting. The Defendants contend that General Housel engaged in prosecutorial misconduct during her conversation with Carney.

"Among the factors considered by this [C]ourt when reviewing an allegation of prosecutorial misconduct are: the intent of the prosecutor, the curative measures undertaken by the court, the improper conduct viewed in context and in light of the facts and circumstances of the case, the cumulative effect of the remarks with any errors in the record, and the relative strength or weakness of the case." State v. Farmer, 927 S.W.2d 582, 590-91 (Tenn. Crim. App. 1996) (quoting Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976)). We agree with Marcus that it is the State's duty to "refrain from improper methods calculated to produce a wrongful conviction." Berger v. United States, 295 U.S. 78, 88 (1935).

We do not agree that General Housel conducted herself in an improper way when speaking to Carney, however. After she was recalled, Carney testified that fear led her not to identify Elvin

during her first round of testimony. Outside the courtroom, General Housel asked Carney whether she was all right. Carney responded that she thought she recognized one of the perpetrators in the courtroom. The record contains no evidence that General Housel threatened Carney or pressured her into testifying in a particular way.

Absent an abuse of discretion, we will not disturb the trial court's decision to allow the State to recall Carney. See State v. Caughron, 855 S.W.2d 526, 539. We see no evidence of such an abuse here. This issue is without merit.

III. Elvin Pearson's Additional Points of Error

A. Motion to Suppress Newsom's Out-of-Court Identification

Elvin next contends that Newsom's out-of-court identification using Det. Bledsoe's photographic lineup was inherently suggestive under State v. Philpott, 882 S.W.2d 394 (Tenn. Crim. App. 1994), and that the trial court therefore should have granted his motion to suppress the identification. He offers no argument explaining the manner in which he contends the photographic lineup was impermissibly suggestive, and we deem the issue to be waived. Tenn. R. Crim. App. 10(b); see also Tenn. R. App. P. 27(a)(7). Elvin further claims that Newsom stated at trial that he identified Elvin solely by reference to his resemblance to Marcus. This misstates Newsom's testimony. The relevant exchange proceeded as follows:

> [Elvin's Counsel]: Okay. So when you make your identification of Elvin Pearson, you are basing it on how much he looked like Marcus; is that right?
>
> [Newsom]: No, I based it on what he looked like.

Newsom thus testified that he based his identification on the relevant photograph's similarity to one of the perpetrators of the shooting in this case. This issue is without merit.

B. Motion to Suppress Comer's In-Court Identification

Elvin next contends that the trial court erred in denying his motion to prevent Comer from identifying him in court. He again suggests that Det. Bledsoe's photographic lineup was inherently suggestive, but he offers no argument to that effect. The issue is therefore waived. Tenn. R. Crim. App. 10(b); see also Tenn. R. App. P. 27(a)(7). Elvin also argues, however, that Comer's in-court identification was improperly influenced by his knowledge of Newsom's identification of Elvin during the preliminary hearing.

Elvin suggests that Comer first was unable to identify him out-of-court. While we agree that Comer was unable to positively identify Elvin, he stated that Elvin "might be" one of the shooters, but he had shorter hair in the lineup photograph. We need not decide if the trial court committed error here, however, because any error would be harmless. See Tenn. R. Crim. P. 52(a) (stating that "[n]o judgment of conviction shall be reversed on appeal except for errors which affirmatively appear to have affected the result of the trial on the merits"). At least one other reliable and

admissible identification, along with other evidence, suffices to demonstrate harmless error in the admission of a potentially unreliable identification. See Philpott, 882 S.W.2d at 401.

We conclude that Newsom's in-court identification of Marcus Elvin was admissible. Elvin urges us to apply the test announced in Neil v. Biggers, 409 U.S. 188 (1972), to determine reliability; that "totality of the circumstances" test, however, applies only to potentially cure an identification made based on suggestive procedures. 409 U.S. at 199. We see nothing suggestive about the procedures used during Newsom's photographic identification of Elvin; we therefore cannot conclude that identification was unreliable. This issue is without merit.

C. Impeachment Using Comer's Juvenile Convictions

Elvin next contends that the trial court erred in excluding impeachment of Comer using an instance in which Comer had been adjudicated delinquent for selling cocaine. Marcus objected to exclusion of this evidence, but Elvin did not. The issue is therefore waived. See Tenn. R. App. P. 36(a).

D. Impeachment Using Newsom's Prior Felony Convictions

The trial court allowed Elvin to impeach Newsom under Tennessee Rule of Evidence 609 using a prior felony conviction for accessory after the fact of an aggravated robbery. Elvin next contends that the trial court erred by preventing him from cross-examining Newsom regarding the details of that conviction. A trial court's rulings under Rule 609 will not be overturned absent an abuse of discretion. State v. Blanton, 926 S.W.2d 953, 960 (Tenn. Crim. App. 1996).

In adopting Rule 609, our supreme court recognized that, "[i]f it is determined that the prior crime is within the admissible category, the inquiry in the presence of the jury, '. . . (m)ust be limited to the fact of a former conviction and of what crime, with the object only of affecting the credibility of the witness . . . ." State v. Morgan, 541 S.W.2d 385, 389 (Tenn. 1976) (quoting Hendricks v. State, 39 S.W.2d 580, 581 (Tenn. 1931)); see also Cohen, et al., Tennessee Law of Evidence § 6.09[11][f] (5th ed. 2005) (stating that "[i]f a criminal conviction is used to impeach under Rule 609, counsel can ask about the date and fact of the conviction and the nature of the crime, but is precluded from inquiring about details of the offense"). We therefore conclude the trial court did not abuse its discretion in excluding the details of Newsom's prior conviction. This issue is without merit.

E. State Use of Recorded Phone Call

Seeking to impeach Elvin's alibi, the State attempted to introduce a recording of a phone call Elvin made from jail. It appears that a very brief portion of the recording, believed to contain Elvin's voice, was played in the jury's presence for authentication purposes. The trial court then ordered a jury-out conference to determine the recording's admissibility. The record contains no information about which portion of the recording was heard by the jury and also does not specify which portions were heard by the trial court in the subsequent conference. The trial court ruled the recording inadmissible because its contents were irrelevant to the impeachment of Elvin.

Elvin contends that he had no notice of the State's intent to use this recording to impeach his alibi, that notice being required under Tennessee Rule of Criminal Procedure 12.1. He argues that the trial court therefore erred in failing to grant a motion in limine to exclude the recording. On appeal, the State argues that Elvin has waived this issue because the motion in limine to exclude impeachment evidence was made by Marcus. Elvin also argues that the trial court erred in allowing any portion of the tape to be played.

We need only note that, but for a small portion, the recording was not played for the jury. It was not admitted into evidence. The record does not indicate which portion of the recording the jury heard; "[a]bsent the necessary relevant material in the record an appellate court cannot consider the merits of the issue." State v. Ballard, 855 S.W.2d 557, 561 (Tenn. 1993); see also Tenn. R. App. P. 24(b). We are therefore unable to consider these issues on their merits, except to note that the circumstances surrounding the brief use of the recording suggest that any error would have been harmless, as it could not have affected the merits of the trial. See Tenn. R. Crim. P. 52(a).

F. Improper Statements by the State

Elvin next contends that the trial court erred in failing to strike three improper statements made by General Housel in her closing argument. First, he argues that she improperly referred to Reid's testimony from an earlier hearing that she and Elvin left their house at 4:30 p.m. on April 15, 2006. Second, Elvin notes General Housel's claim that Carney told her, "that is him," in reference to Elvin. Third, he objects to General Housel's attempt to attack Elvin's alibi by asserting that Elvin's child was too old to drink baby formula, thus obviating his claimed need to return to his house to retrieve a baby formula refill.

"It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw" or "to intentionally refer to or argue facts outside the record unless the facts are matters of common public knowledge." State v. Goltz, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003). Improper arguments by a prosecutor amount to reversible error when they are so improper or inflammatory that they could have affected the verdict. See State v.Richardson,995 S.W.2d 119, 127 (Tenn. Crim. App. 1998). In assessing whether misconduct affected the verdict, we again turn to the Judge factors outlined above in Section II.

General Housel's comment that Reid had testified about leaving the house at 4:30 p.m. referred to potential evidence that, because Reid was not called to testify, had been excluded as hearsay; as such, the comment was a misstatement of the evidence. We cannot conclude that the comment affected the verdict, however. Even if the jury understood as evidence the proposition that Elvin and Reid had left the house at 4:30 p.m., that information is not meaningfully different from Elvin's testimony that they had left the house "before 5:00" and arrived at B & R by that time.

As to General Housel's claim that Carney said, "that is him," Elvin first contends that this constituted a discussion before the jury of an out-of-court conversation. We disagree. General Housel specifically referred to Carney's testimony regarding their conversation, not to the conversation itself: "[Carney] said that I went out there and asked how she was doing and then she

said that is him, and then threw up." Elvin did not object to this argument at trial and has thus waived the issue. See Tenn. R. App. P. 36(b).

We agree with Elvin that General Housel's argument regarding baby formula intentionally referred to facts outside the record that are not matters of common public knowledge. See Goltz, 111 S.W.3d at 6. We cannot conclude that the comment was so improper or inflammatory that it affected the verdict, however. Upon objection, the trial court ordered the jury to "[d]isregard that argument right there, there has been no testimony in regard to that." The trial court also noted that "[n]one of that is evidence, the jury knows that. This argument, all right." These are strong curative instructions that help to remedy the effect of General Housel's comment. See Farmer, 927 S.W.2d at 590-91. Elvin's presence at his house is a key issue in this case, however, because his phone records show he made a call from there at 5:37 p.m. General Housel's comment thus could have affected Elvin's alibi by calling into question his credibility and shedding doubt on his story. The comment may therefore have had some affect under the facts and circumstances of this case. See id. In our view, the improper argument does not warrant reversal of the convictions. The State presented two positive in-court identifications of both Elvin and Marcus and one non-positive in-court identification of Elvin. Elvin's alibi may well have been more damaged by his testimony that he had a receipt that read 5:41 p.m., four minutes after a call had been made from his home, regardless of his claim that the beauty store register must have been wrong by an hour. Under these circumstances we cannot conclude that General Housel's inappropriate comment could have affected the verdict. This issue is without merit.

G. Improper Impeachment by Transcript

Elvin next contends that the trial court erred by allowing the State to cross-examine him using a transcript of a bond hearing at which his girlfriend, Dianne Reid, had testified. Reid did not testify at trial. During the State's cross-examination, Elvin was asked about a number of Reid's statements without first having been provided with a transcript of the hearing. After he was provided with a copy, Marcus objected that Reid's former testimony was hearsay, and the court excluded it on that basis.

Elvin did not request a mistrial at this or any other point in the trial; as such, he has waived this issue. See Tenn. R. App. P. 36(a).

H. Consecutive Sentencing

Elvin next contends that the trial court improperly ordered him to serve his concurrent twenty-year sentences consecutive to his life sentence for felony murder. Tennessee Code Annotated section 40-35-115(b) lists a number of findings that support the imposition of consecutive sentences. In this case, the trial court found that Elvin and Marcus were "dangerous offender[s] whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." Tenn. Code. Ann. § 40-35-115(4). It imposed consecutive sentencing on this basis.

Consecutive sentencing is a matter addressed to the sound discretion of the trial court. See State v. James, 688 S.W.2d 463, 465 (Tenn. Crim. App. 1984). "The imposition of consecutive sentences on an offender found to be a dangerous offender," however, "requires, in addition to the application of general principles of sentencing, the finding that an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences must reasonably relate to the severity of the offenses committed." State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995).

Although the trial court found Elvin and Marcus to be dangerous offenders at sentencing, it did not make the findings required by Wilkerson. The State concedes error and asserts that Elvin's case must be remanded. We agree. We therefore remand Elvin's case to the trial court for resentencing consistent with Wilkerson.

Marcus does not argue this issue on appeal; it is thus waived unless we deem it to be plain error. See Tenn. R. App. P. 36(a). Tennessee Rule of Criminal Procedure 52(b) states, however, that "[a]n error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice." We conclude that the trial court committed plain error by not making the requisite findings to support consecutive sentences and that a remand is therefore necessary to do substantial justice. Accordingly, we also remand Marcus' case to the trial court for resentencing consistent with Wilkerson.

I. Irrelevant Evidence at Sentencing

Elvin next contends that the State introduced irrelevant evidence at sentencing when it presented proof that a Mac-90 assault rifle, ammunition, bullet magazines, a bulletproof vest, and a card appearing to list drug sales were found in Elvin's apartment. Elvin argues that evidence of these items was not relevant under the Tennessee Rules of Evidence because it had no "tendency to make more probable or less probable" the applicability of sentencing enhancement factors. Tenn. R. Evid. 401. Elvin's sentence was enhanced in part based on Tennessee Code Annotated section 40-35-114(1), that he "has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range." We conclude that the evidence introduced at sentencing made more probable the proposition that Elvin had a previous history of criminal behavior. This issue is without merit.

III. Denial of Marcus Pearson's Severance Motion

Because he was unaware of its existence and its contents, Marcus moved for a severance at trial upon learning that the State planned to use Elvin's recorded phone call. The trial court denied Marcus' motion after the jury-out conference in which it held the recording inadmissible.

A trial court shall grant a severance of defendants during trial if "it is deemed necessary to achieve a fair determination of the guilt or innocence of one or more defendants." Tenn. R. Crim. P. 14(c)(2)(ii). "Severance of defendants is a matter that rests within the sound discretion of the trial court, and this Court will not disturb the trial court's ruling absent clear abuse of that discretion."

State v. Dotson, 254 S.W.3d 378, 390 (Tenn. 2008). To prevail on appeal, a defendant must show he was "clearly prejudiced." Hunter v. State, 440 S.W.2d 1, 5 (Tenn. 1969).

We conclude that Marcus has failed to demonstrate prejudice here. As noted, the recording was not introduced into evidence. We have also noted that the record does not reflect the content of the small portion played for the jury, precluding us from considering this issue. See Tenn. R. App. P. 24(b). The circumstances surrounding the recording being played certainly do not demonstrate prejudice. The trial court did not abuse its discretion in denying Marcus' severance motion. This issue is without merit.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the Defendants' convictions, but we remand for resentencing solely on the issue of consecutive sentences consistent with Wilkerson.

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DAVID H. WELLES, JUDGE